

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 MARVIN D. RICHARD,
5 Petitioner,
6 v.
7 JERRY HOWELL, *et al.*,
8 Respondents.
9

Case No. 2:18-cv-00181-KJD-NJK

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS (ECF NO. 52),
AND DENYING MOTION FOR
EVIDENTIARY HEARING (ECF NO. 57)**

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12 Introduction

13 In this habeas corpus action, brought by Nevada prisoner Marvin D. Richard, the
14 respondents have filed a motion to dismiss. The Court will grant that motion in part and
15 deny it in part, and will deny Richard's motion for an evidentiary hearing, as is explained
16 below.

17 Background

18 On October 13, 2010, Richard was convicted, after a jury trial, in Nevada's Eighth
19 Judicial District Court, in Clark County, of second-degree murder with use of a deadly
20 weapon, and he was sentenced to 10 to 25 years in prison for the murder and an
21 additional and consecutive 3 to 8 years for the use of a deadly weapon. See Judgment
22 of Conviction, Exh. 2 (ECF No. 9-2). The conviction was the result of Richard's killing,
23 by stabbing, of his long-time live-in girlfriend, Loreal Goodwin.

24 Richard appealed. See Fast Track Statement, Exh. 3 (ECF No. 9-3). The Nevada
25 Supreme Court affirmed the judgment of conviction on June 8, 2011. See Order of
26 Affirmance, Exh. 6 (ECF No. 9-6). The remittitur was issued on July 5, 2011. See
27 Remittitur, Exh. 7 (ECF No. 9-7).
28

1 Richard filed a *pro se* state habeas petition on February 21, 2012. See Petition
2 for Writ of Habeas Corpus, Exh. 8 (ECF No. 9-8). Counsel was appointed for Richard,
3 and, with counsel, Richard filed a supplemental petition. See Supplemental Petition for
4 Post-Conviction Writ of Habeas Corpus, Exh. 11 (ECF Nos. 9-11, 10-1, 10-2); Amended
5 Supplemental Petition for Post-Conviction Writ of Habeas Corpus, Exh. 13 (ECF No. 10-
6 4). The state district court held an evidentiary hearing on August 28, 2014. See
7 Transcript of Evidentiary Hearing, Exh. 161 (ECF No. 40-1). After the evidentiary
8 hearing, the court appointed an expert on battered-spouse syndrome to evaluate
9 Richard. See Order Appointing Dr. Shera Bradley, Ph.D., as Court Appointed
10 Psychologist, Exh. 17 (ECF No. 11-2). The court ordered supplemental briefing, and
11 Richard filed a second supplemental petition. See Second Supplemental Petition for
12 Writ of Habeas Corpus, Exh. 18 (ECF No. 11-3). Then, after entertaining oral argument
13 (see Transcript of Proceedings, January 20, 2016, Exh. 180 (ECF No. 40-20)), the state
14 district court denied Richard's petition in a written order filed on August 17, 2016. See
15 Findings of Fact, Conclusions of Law and Order, Exh. 22 (ECF No. 11-7). Richard
16 appealed. See Appellant's Opening Brief, Exh. 24 (ECF No. 11-9). The Nevada Court of
17 Appeals affirmed the denial of Richard's petition on August 16, 2017. See Order of
18 Affirmance, Exh. 28 (ECF No. 11-13). The remittitur was issued on September 11,
19 2017. See Remittitur, Exh. 29 (ECF No. 11-14).

20 This Court received a *pro se* petition for writ of habeas corpus from Richard,
21 initiating this action, on January 31, 2018; the petition states that it was mailed on
22 January 29, 2018. See Petition for Writ of Habeas Corpus, p. 1 (ECF No. 1-1, p. 2). The
23 Court granted Richard's motion for appointment of counsel, and appointed counsel to
24 represent him. See Order entered February 9, 2018 (ECF No. 4). With counsel, Richard
25 filed a first amended petition on March 23, 2018 (ECF No. 8), a second amended
26 petition on October 4, 2018 (ECF No. 18), and a third amended petition, his operative
27 petition, on April 22, 2019 (ECF No. 50).

1 In his third amended petition, Richard asserts the following grounds for habeas
2 corpus relief:

3 1A. Richard's federal constitutional rights were violated as a result of
4 ineffective assistance of his trial counsel, on account of his trial counsel's
failure "to call lay witnesses in support of the theory of self-defense."

5 1B. Richard's federal constitutional rights were violated as a result of
6 ineffective assistance of his trial counsel, on account of his trial counsel's
7 failure "to present expert evidence regarding psychological issues
involving intimate partner violence."

8 1C. Richard's federal constitutional rights were violated as a result of
9 ineffective assistance of his trial counsel, because "trial counsel tricked
Mr. Richard into testifying in his defense."

10 1D. Richard's federal constitutional rights were violated as a result of
11 ineffective assistance of his trial counsel, because "counsel didn't ask
Mr. Richard about Ms. Goodwin's aggressive nature."

12 1E. Richard's federal constitutional rights were violated as a result of
13 ineffective assistance of his trial counsel, because "counsel failed to follow
up on juror tampering."

14 1F. Richard's federal constitutional rights were violated as a result of
15 ineffective assistance of his trial counsel, on account of his trial counsel's
failure "to litigate the issue whether the police acted in bad faith when they
failed to test Mr. Richard's blood."

16 2. Richard's federal constitutional rights were violated as a result of
17 ineffective assistance of his trial counsel, because of trial counsel's failure
to present certain evidence in mitigation at Richard's sentencing.

18 3. Richard's federal constitutional rights were violated because, when
19 he decided to testify at trial, Richard "did not knowingly and voluntarily
waive his right against self-incrimination."

20 4. Richard's federal constitutional rights were violated because "[t]he
21 jury's verdict was contaminated by juror misconduct and tampering."

22 5. Richard's federal constitutional rights were violated because "[t]he
23 State failed to preserve material evidence by not testing Mr. Richard's
blood, it made that decision in bad faith, and the relevant detective lied
about that under oath."

24 6. Richard's federal constitutional rights were violated because "[t]he
25 State failed to timely turn over relevant discovery to defense counsel."

26 Third Amended Petition (ECF No. 51), pp. 11–35.

27 On May 22, 2019, Respondents filed their motion to dismiss (ECF No. 52),
28 arguing that Grounds 1C, 1D and 3 of Richard's third amended petition are barred by

1 the statute of limitations, and that Grounds 1B,1C, 1D, 1E, 1F, 3, 4 and 5 are, in part or
2 in their entirety, unexhausted in state court. Richard filed an opposition to the motion
3 to dismiss on September 20, 2019 (ECF No. 55). Respondents filed a reply on
4 October 14, 2019 (ECF No. 59).

5 On September 20, 2019, with his opposition to the motion to dismiss, Richard
6 filed a motion for evidentiary hearing (ECF No. 57). Respondents filed an opposition to
7 that motion on October 3, 2019 (ECF No. 58), and Richard replied on October 22, 2019
8 (ECF No. 60).

9 Discussion

10 Statute of Limitations

11 Respondents argue in their motion to dismiss that Grounds 1C, 1D and 3 of Richard's
12 third amended petition are barred by the statute of limitations. See Motion to Dismiss
13 (ECF No. 52), pp. 7–10.

14 The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in 1996,
15 established a one-year statute of limitations for federal habeas petitions filed by
16 prisoners challenging state convictions; the statute provides:

17 (1) A 1-year period of limitation shall apply to an application for a
18 writ of habeas corpus by a person in custody pursuant to the judgment of
a State court. The limitation period shall run from the latest of --

19 (A) the date on which the judgment became final by
20 the conclusion of direct review or the expiration of the time
for seeking such review;

21 (B) the date on which the impediment to filing an
22 application created by State action in violation of the
Constitution or laws of the United States is removed, if the
23 applicant was prevented from filing by such State action;

24 (C) the date on which the constitutional right asserted
was initially recognized by the Supreme Court, if the right
25 has been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

26 (D) the date on which the factual predicate of the
27 claim or claims presented could have been discovered
through the exercise of due diligence.

1 28 U.S.C. 2244(d)(1).

2 The statute of limitations is tolled during the time that a properly filed application
3 for state post-conviction or other collateral review is pending in state court. See 28
4 U.S.C. § 2244(d)(2). The statute of limitations is also subject to equitable tolling; a
5 habeas petitioner is entitled to equitable tolling if the petitioner shows “(1) that he has
6 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood
7 in his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010)
8 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Ramirez v. Yates*, 571 F.3d
9 993, 997 (9th Cir. 2009).

10 Richard’s conviction became final, and the limitations period for his federal
11 habeas petition began to run, on September 6, 2011, 90 days after the Nevada
12 Supreme Court ruled on his direct appeal. The limitations period ran for 168 days,
13 from September 6, 2011, to February 21, 2012, when Richard initiated his state
14 habeas action. The limitations period was tolled, under 28 U.S.C. § 2244(d)(2), from
15 February 21, 2012, to September 11, 2017, when the remittitur was issued after the
16 Nevada Court of Appeals ruled on the appeal in Richard’s state habeas action. The
17 limitations period began to run again on September 12, 2017, and it expired 197 days
18 later, on March 28, 2018. Richard filed his original and first amended petitions before
19 the limitations period expired; he filed his second and third amended petitions after the
20 limitations period expired. This much is undisputed. See Motion to Dismiss (ECF No.
21 52), pp. 7–8; Opposition to Motion to Dismiss (ECF No. 55), p. 1; see also First
22 Amended Petition (ECF No. 8), p. 2.

23 Therefore, the question whether Grounds 1C, 1D and 3 of Richard’s third
24 amended petition were timely, under the statute of limitations, turns on whether those
25 claims relate back to the timely-filed original petition or first amended petition. In *Mayle*
26 *v. Felix*, 545 U.S. 644 (2005), the Supreme Court held that “[s]o long as the original and
27 amended petitions state claims that are tied to a common core of operative facts,
28 relation back will be in order,” but “[a]n amended habeas petition ... does not relate back

1 (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for
2 relief supported by facts that differ in both time and type from those the original pleading
3 set forth." *Mayle*, 545 U.S. at 650, 664.

4 In Ground 1C, Richard claims that his federal constitutional rights were violated
5 as a result of ineffective assistance of counsel, because his trial counsel tricked him into
6 testifying at trial. See Third Amended Petition (ECF No. 51), pp. 25–26. He claims that
7 his trial counsel wanted him to testify, and he agreed to do so only if counsel called
8 other witnesses. See *id.* He claims that he testified, but his trial counsel broke their
9 agreement by not calling any other witnesses to testify. See *id.* Richard argues that
10 Ground 1C relates back to Grounds 4A and 4B of his first amended petition. See
11 Opposition to Motion to Dismiss (ECF No. 55), pp. 2–4. However, while Grounds 4A
12 and 4B of the first amended petition include allegations that Richard's trial counsel failed
13 to call certain witnesses, there is no mention in those claims of Richard's decision to
14 testify. See First Amended Petition (ECF No. 8), pp. 16–32. Grounds 4A and 4B of the
15 first amended petition do not share a common core of operative facts with Ground 1C
16 of the third amended petition. Richard also argues that Ground 1C relates back to
17 Ground 3 of the first amended petition. See Opposition to Motion to Dismiss (ECF No.
18 55), pp. 2–4. In Ground 3 of the first amended petition, Richard claims that the
19 prosecution presented out-of-court statements of the victim, violating his federal
20 constitutional rights. First Amended Petition (ECF No. 8), pp. 14–16. That claim,
21 however, included no mention of trial counsel's failure to call witnesses, and it included
22 only a passing allegation that the admission of the out-of-court statements may have
23 affected Richard's decision to testify. *Id.* at 16. Ground 3 of the first amended petition
24 does not share a common core of operative facts with Ground 1C of the third amended
25 petition. The Court, then, determines that Ground 1C does not relate back to Richard's
26 timely filed original and first amended petitions, and is barred by the statute of
27 limitations. The Court will grant the motion to dismiss with respect to Ground 1C.

1 In Ground 1D, Richard claims that his federal constitutional rights were violated
2 as a result of ineffective assistance of his trial counsel, because his trial counsel did not,
3 in examining him, ask about the victim's aggressive nature. See Third Amended Petition
4 (ECF No. 51), pp. 26–27. Richard argues that Ground 1D relates back to Ground 4B of
5 his first amended petition. See Opposition to Motion to Dismiss (ECF No. 55), p. 4.
6 Ground 4B, though, does not involve Richard's testimony, or his trial counsel's
7 questioning of him. See First Amended Petition (ECF No. 8), pp. 29–32. Ground 4B of
8 the first amended petition and Ground 1D of the third amended petition do not share a
9 common core of operative fact. Ground 1D does not relate back to Richard's timely filed
10 original and first amended petitions and is barred by the statute of limitations. The Court
11 will grant the motion to dismiss with respect to Ground 1D.

12 In Ground 3, Richard claims that his federal constitutional rights were violated
13 because, when he decided to testify, he did not knowingly and voluntarily waive his right
14 against self-incrimination. See Third Amended Petition (ECF No. 51), p. 32. This claim
15 is based on the same allegation as Ground 1C: that Richard's trial counsel misled him
16 to believe that if he testified counsel would call other witnesses. See *id.* Richard argues
17 that Ground 3, like Ground 1C, relates back to Grounds 3, 4A and 4B of his first
18 amended petition. See Opposition to Motion to Dismiss (ECF No. 55), pp. 4–5. The
19 Court, however, finds that Grounds 3, 4A and 4B of Richard's first amended petition
20 do not share a common core of operative facts with either Ground 1C or Ground 3.
21 Ground 3 does not relate back to the timely-filed original and first amended petitions
22 and is barred by the statute of limitations, and the Court will therefore grant the motion
23 to dismiss with respect to Ground 3.

24 Exhaustion and Procedural Default

25 Respondents argue in their motion to dismiss that Grounds 1B, 1C, 1D, 1E, 1F,
26 3, 4 and 5 of Richard's third amended petition are, in part or entirely, unexhausted in
27 state court. See Motion to Dismiss (ECF No. 52), pp. 10–14.
28

1 A federal court may not grant habeas corpus relief on a claim not exhausted in
2 state court. 28 U.S.C. § 2254(b). The exhaustion requirement is based on the policy of
3 federal-state comity, and is intended to allow state courts the initial opportunity to
4 correct constitutional deprivations. *See Picard v. Conner*, 404 U.S. 270, 275 (1971). To
5 exhaust a claim, a petitioner must fairly present the claim to the highest available state
6 court and must give that court the opportunity to address and resolve it. *See Duncan v.*
7 *Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,
8 10 (1992). A claim is fairly presented to the state court if, before that court, the petitioner
9 describes the operative facts and legal theory upon which the claim is based. *See*
10 *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard*, 404 U.S. at 275;
11 *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982).

12 Ground 1B

13 Ground 1B has been exhausted in state court. Ground 1B is Richard's claim that
14 his federal constitutional rights were violated as a result of ineffective assistance of
15 counsel, on account of his trial counsel's failure "to present expert evidence regarding
16 psychological issues involving intimate partner violence." Third Amended Petition (ECF
17 No. 51), pp. 19–25. Richard asserted a similar claim in state court. *See* Supplemental
18 Petition for Post-Conviction Writ of Habeas Corpus, Exh. 11 (ECF Nos. 9-11, 10-1, 10-
19 2); Amended Supplemental Petition for Post-Conviction Writ of Habeas Corpus, Exh. 13
20 (ECF No. 10-4); Transcript of Evidentiary Hearing, Exh. 161 (ECF No. 40-1); Second
21 Supplemental Petition for Writ of Habeas Corpus, Exh. 18 (ECF No. 11-3); Transcript of
22 Proceedings, January 20, 2016, Exh. 180 (ECF No. 40-20); Findings of Fact,
23 Conclusions of Law and Order, Exh. 22 (ECF No. 11-7); Appellant's Opening Brief, Exh.
24 24 (ECF No. 11-9). A claim is unexhausted if, in federal court, it is fundamentally altered
25 such as to place it in a significantly different and stronger evidentiary posture than when
26 the state court considered it. *See Dickens v. Ryan*, 740 F.3d 1302, 1318–19 (9th Cir.
27 2014) (en banc). While Richard has changed the emphasis of this claim somewhat, and
28 supports it with new argument and evidence, the Court finds that Richard has not

1 changed the claim so as to render it significantly different and stronger. The Court
2 determines that Ground 1B is exhausted in state court. The Court will, therefore, deny
3 the motion to dismiss with respect to Ground 1B.

4 Ground 5

5 In Ground 5, Richard claims that his federal constitutional rights were violated
6 because “[t]he State failed to preserve material evidence by not testing Mr. Richard’s
7 blood, it made that decision in bad faith, and the relevant detective lied about that under
8 oath.” Third Amended Petition (ECF No. 51), pp. 33–34. Respondents argue that the
9 portion of this claim asserting that the detective lied under oath is unexhausted in state
10 court. See Motion to Dismiss (ECF No. 52), p. 12. Respondents’ argument is accurate.
11 On his direct appeal, Richard asserted his claim that the State failed, in bad faith, to
12 preserve material evidence by not testing Richard’s blood, but he did not claim that the
13 detective lied. See Fast Track Statement, Exh. 3, pp. 9–11 (ECF No. 9-3, pp. 10–12).
14 Richard’s claim that the detective lied under oath is unexhausted in state court.

15 In his opposition to the motion to dismiss, Richard argues that if he were now to
16 return to state court to attempt to exhaust his unexhausted claims, his claims would be
17 procedurally barred in state court. See Opposition to Motion to Dismiss (ECF No. 55).
18 Therefore, Richard argues, the claims he has not yet presented in state court are
19 technically exhausted, but subject to the procedural default doctrine. See *id.*

20 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
21 to comply with the state’s procedural requirements in presenting his claims is barred by
22 the adequate and independent state ground doctrine from obtaining a writ of habeas
23 corpus in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991) (“Just as
24 in those cases in which a state prisoner fails to exhaust state remedies, a habeas
25 petitioner who has failed to meet the State’s procedural requirements for presenting his
26 federal claims has deprived the state courts of an opportunity to address those claims in
27 the first instance.”). Where such a procedural default constitutes an adequate and
28 independent state ground for denial of habeas corpus, the default may be excused only

1 if “a constitutional violation has probably resulted in the conviction of one who is actually
2 innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting
3 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

4 To demonstrate cause for a procedural default, the petitioner must “show that
5 some objective factor external to the defense impeded” his efforts to comply with the
6 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external
7 impediment must have prevented the petitioner from raising the claim. See *McCleskey*
8 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner
9 bears “the burden of showing not merely that the errors [complained of] constituted a
10 possibility of prejudice, but that they worked to his actual and substantial disadvantage,
11 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,
12 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170
13 (1982).

14 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
15 assistance of post-conviction counsel may serve as cause, to overcome the procedural
16 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme
17 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
18 postconviction proceeding does not establish cause” to excuse a procedural default.
19 *Martinez*, 566 U.S. at 15. The *Martinez* Court, however, “qualif[ied] *Coleman* by
20 recognizing a narrow exception: inadequate assistance of counsel at initial-review
21 collateral proceedings may establish cause for a prisoner’s procedural default of a claim
22 of ineffective assistance at trial.” *Id.* at 9. The Court described “initial-review collateral
23 proceedings” as “collateral proceedings which provide the first occasion to raise a claim
24 of ineffective assistance at trial.” *Id.* at 8.

25 The Court determines, then, that the part of Ground 5 asserting that Richard’s
26 federal constitutional rights were violated because the detective lied under oath is
27 technically exhausted but is subject to dismissal as procedurally defaulted. Richard
28 does not make any colorable argument that there was cause for the default. *Martinez*

1 does not apply to this claim because it is not a claim of ineffective assistance of trial
2 counsel.

3 The Court, therefore, will grant the motion to dismiss with respect to the part of
4 Ground 5 asserting that Richard's federal constitutional rights were violated because the
5 detective lied under oath and will dismiss that claim.

6 Grounds 1C, 1D, 1E, 1F, 3 and 4

7 Next, Respondents point out that, in his third amended petition, Richard
8 concedes that Grounds 1C, 1D, 1E, 1F, 3 and 4 have not been exhausted in state court.
9 See Motion to Dismiss (ECF No. 52), p. 13; see *also* Third Amended Petition (ECF No.
10 51), pp. 11, 32–33.

11 Regarding Grounds 1C, 1D and 3, as is discussed above, those claims will be
12 dismissed as barred by the statute of limitations; therefore, the Court does not address
13 the question whether they are exhausted or procedurally defaulted.

14 Regarding Grounds 1E, 1F and 4, in his response to the motion to dismiss,
15 Richard argues that those claims are technically exhausted but subject to the
16 procedural default doctrine, and he argues that he can overcome the procedural
17 defaults by showing cause and prejudice under *Martinez*. Opposition to Motion to
18 Dismiss (ECF No. 55), pp. 24–30.

19 Ground 4 is not a claim of ineffective assistance of trial counsel. Rather, it is a
20 claim that Richard's federal constitutional rights were violated because "[t]he jury's
21 verdict was contaminated by juror misconduct and tampering." Third Amended Petition
22 (ECF No. 51), p. 33. *Martinez* does not apply to such a claim, and, Richard does not
23 make any other colorable argument that he can overcome the procedural default of
24 Ground 4. Therefore, the Court will grant the motion to dismiss with respect to Ground 4
25 and will dismiss that claim as procedurally defaulted.

26 Grounds 1E and 1F are claims of ineffective assistance of trial counsel. See
27 Third Amended Petition (ECF No. 51), pp. 27–31. Regarding these claims, then,
28 Richard might be able to overcome the procedural default by showing that his state

1 post-conviction counsel was ineffective for not asserting the claims. However, the Court
2 determines that these issues – whether Richard can overcome the procedural defaults
3 of Grounds 1E and 1F under *Martinez* – are intertwined with the merits of Grounds 1E
4 and 1F, such that they will be better addressed in conjunction with the merits of those
5 claims, after Respondents file an answer and Richard files a reply. Therefore, the Court
6 will deny Respondents' motion to dismiss Grounds 1E and 1F, without prejudice to
7 Respondents raising their exhaustion and procedural default defenses to those claims
8 in their answer.

9 Motion for Evidentiary Hearing

10 Richard filed a motion for evidentiary hearing (ECF No. 57), requesting an
11 evidentiary hearing on the question whether, under *Martinez*, he can show cause and
12 prejudice for his procedural defaults. However, as the Court determines that those
13 issues will be better addressed in conjunction with the merits of Richard's claims, after
14 Respondents file an answer and Richard files a reply, the Court will deny Richard's
15 motion for evidentiary hearing with respect to the motion to dismiss, without prejudice to
16 him moving for an evidentiary hearing when he files his reply to Respondents' answer,
17 as contemplated in the schedule set forth in the order entered on March 29, 2018 (ECF
18 No. 14).

19 **IT IS THEREFORE ORDERED** that Respondents' Motion to Dismiss (ECF No.
20 52) is **GRANTED IN PART AND DENIED IN PART**. The following claims in Petitioner's
21 Third Amended Petition for Writ of Habeas Corpus (ECF No. 51) are dismissed:
22 Grounds 1C, 1D, 3 and 4, and the part of Ground 5 asserting that Richard's federal
23 constitutional rights were violated because the detective lied under oath. In all other
24 respects, the Motion to Dismiss is denied.

25 **IT IS FURTHER ORDERED** that Petitioner's Motion for an Evidentiary Hearing
26 (ECF No. 57) is **DENIED**, without prejudice.

1 **IT IS FURTHER ORDERED** that Respondents will have 90 days from the date of
2 this order to file an answer, responding to Petitioner's remaining claims. In all other
3 respects the schedule for further proceedings set forth in the order entered March 29,
4 2018 (ECF No. 14) will remain in effect.

5 **IT IS FURTHER ORDERED** that, pursuant to Federal Rule of Civil Procedure
6 25(d), the Clerk of the Court is directed to substitute Jerry Howell for Jo Gentry as the
7 respondent warden, on the docket for this case.

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9 DATED THIS 5th day of November _____, 2019.

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13 KENT J. DAWSON,
14 UNITED STATES DISTRICT JUDGE
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